FILE COPY

Office - Supreme Court, U.S.
FILED
MAR 17 1949
CHARLES ELMORE CROPLEY
CLERK

No. 648

IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

EARNEST DEWAR, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

HOWARD F. McCUE and
ROY N. McCUE,
505 Columbian Building,
Topeka, Kansas,
Attorneys for the Petitioner.

KELLEY PRINTING CO., TOPEKA

TABLE OF CONTENTS.

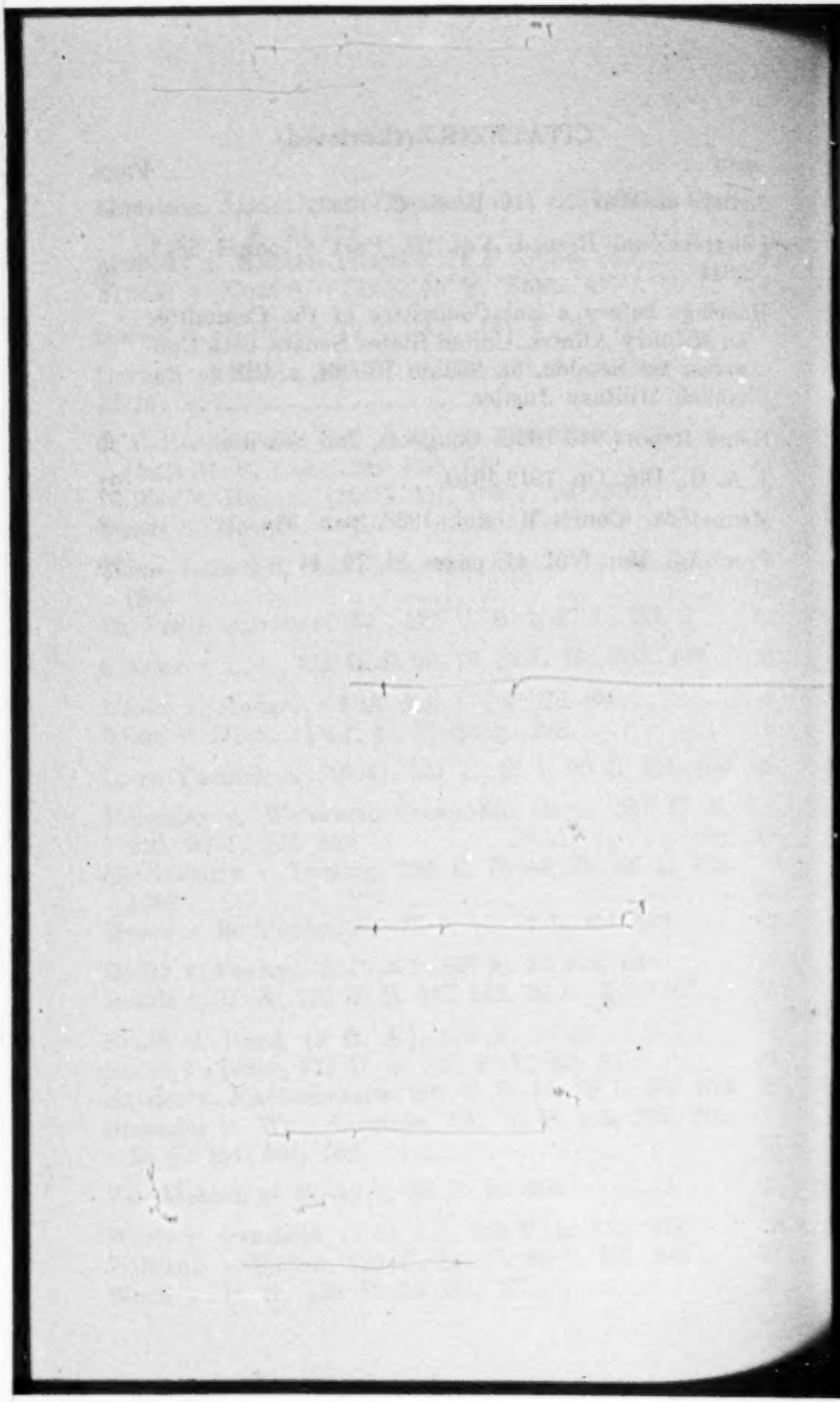
	Page
OPINIONS BELOW	2
JURISDICTION	2
EXPLANATION OF RECORD	2
SUMMARY OF MATTER INVOLVED	3
QUESTIONS PRESENTED	8
REASONS FOR GRANTING WRIT	8
a. Conflict of Opinion in Lower Courts	9
b. Interpretation of Federal Statutes	10
c. Article of War 70 is Jurisdictional	11
d. Due Process Denied	12
e. There was no Compliance with AW 70 in this Case	14
f. Congress Intended AW 70 as Jurisdictional	20
g. Petitioner was Denied Counsel at Pre-trial	21
h. Articles of War Unconstitutional	22
Conclusion	26

CITATIONS.

	Page
American Agricultural Chemical Co. v. Thomas, (S. C.), 34 S. E. 2d 592	11
Anthony v. Hunter, (Kans.), 71 F. Supp. 823	9
Arnold v. Cozart, (Tex.), 75 F. Supp. 47	10
Becker v. Webster, (2 C. A.), 171 F. 2d 762	10
Carter v. Illinois, 329 U. S. 179, 181, 91 L. Ed. 172, 178	22
P. DeRonde & Co. v. U. S. Sugar Equalization Board, (1924 D. S. Del.), 299 Fed. 659	13
DeWar v. Hunter, (10 C. A.), 170 F. 2d 993	9
Dynes v. Hoover, 61 U. S. 65, 80, 15 L. Ed. 858	11
Escoe v. Zerbst, 295 U. S. 490, 492, 79 L. Ed. 1566, 1568	12
Ex Parte Quirin, (1924), 317 U. S. 1, 87 L. Ed. 3	22
Glasser v. U. S., 315 U. S. 60, 76, 86 L. Ed. 680, 702	13
Henry v. Hodges, (2 C. A.), 171 F. 2d 401	9
Hicks v. Hiatt, (Pa.), 64 F. Supp. 238	9
In re Yamashita, (1924), 327 U. S. 1, 90 L. Ed. 499	22
Macaulay v. Waterman Steamship Corp., 327 U. S. 540, 90 L. Ed. 839	12
McClaughry v. Deming, 186 U. S. 49, 62, 46 L. Ed. 1049	11
Myers v. Bethlehem, 303 U. S. 41, 82 L. Ed. 638	12
Reilly v. Pescor, (8 C. A.), 156 F. 2d 632, 634	9
Rinkle v. U. S., 122 U. S. 543, 545, 30 L. Ed. 1167	11
Smith v. Hiatt, (3 C. A.), 170 F. 2d 61	9
Smith v. Texas, 311 U. S. 128, 85 L. Ed. 84	24
Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674	22
Strauder v. West Virginia, 100 U. S. 303, 308, 309, 25 L. Ed. 664, 666	23
Ver Mehren v. Sirmyer, 36 F. 2d 876	11
Waite v. Overlade, (7 C. A.), 164 F. 2d 722, 724	9
Williams v. Kaiser, 323 U. S. 471, 89 L. Ed. 398	22
Wood v. U. S., 128 F. 2d 265, 271	21

CITATIONS—(Continued)

	Page
Article of War 70 (10 U. S. C. 1542)	8, 11
Congressional Record, Vol. 59, Part 6, pages 5843, 5844	20
Hearings before a Sub-Committee of the Committee on Military Affairs, United States Senate, 66th Congress, 1st Session, on Senate Bill 64, a Bill to Establish Military Justice	24
House Report 940 (66th Congress, 2nd Session	20
J. A. G., Dig. Op. 1912-1940	21
Manual for Courts-Martial, 1928, par. 35a	8
Proc. Am. Bar, Vol. 44, pages 84, 70, 44	20



IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

No.———

EARNEST DEWAR, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner, Earnest DeWar, respectfully prays that a writ of certiorari issue and that the Supreme Court review the judgment of the Court of Appeals, Tenth Circuit, affirming the judgment of the United States District Court for Kansas, discharging a writ of habeas corpus and remanding petitioner to the custody of the respondent, Warden of the U. S. Penitentiary, Leavenworth, Kansas.

OPINIONS BELOW.

Opinion of the Court of Appeals and concurring opinion of Circuit Judge Murrah are reported at 170 F. 2d 993. Opinion of the District Court (Judge Mellott) was no treported, but is contained in the Transcript of the habeas corpus hearing, pages 82 to 91.

JURISDICTION.

Judgment of the Court of Appeals was entered November 3, 1948. Motion for Rehearing denied December 6, 1948. Order by Mr. Justice Rutledge dated 23 February, 1949, extending time to and including March 19, 1949. Jurisdiction of the Supreme Court is invoked under 28 U. S. Code 1254 (1).

EXPLANATION OF RECORD.

The District Court granted leave to appeal in forma pauperis. The record before the Court of Appeals included (1) Photostat copy of general court-martial record containing pre-trial, trial and post trial court-martial proceedings involving petitioner; (2) Transcript of testimony and proceedings at habeas corpus hearing in District Court, including District Court's findings and oral opinion; and (3) Pleadings, orders, etc., in District Court.

The Clerk of the Court of Appeals has added to said three documents the proceedings in the Court of Appeals and certified the same as a single transcript. The record of the habeas corpus hearing will be referred to herein by the letters HCR; and the Court-Martial Record by the letters CMR.

SUMMARY OF MATTER INVOLVED.

Petitioner is imprisoned at the U. S. Penitentiary, Leavenworth, Kansas, following conviction at Menden, Germany, April 22, 1945, by U. S. Army General Court-Martial. He was convicted of rape of a German civilian woman, Elizabeth Mathes. Offense alleged to have occurred at Wendelsheim, Germany, the night of March 21, 1945. He was sentenced to death by hanging (CMR 111). Sentence was approved by the Commanding General (CMR 113) and record forwarded pursuant to Article of War 48 (10 U. S. C. 1519) to General Eisenhower, who reduced the sentence to life imprisonment (CMR 114). War Department subsequently reduced sentence to thirty (30) years.

DeWar's home is in the State of Indiana, and he enlisted at Fort Benjamin Harrison, Indiana, 8 August, 1940. His organization was the 5th Signal Company, 5th Infantry Division (CMR 111). He participated in the Tennessee and Florida maneuvers in 1941 and shipped to Iceland in 1942 (HCR 11). After months of combat duty he was questioned at Luxembourg the night of 22 March, 1945, by Military Police of his Division. He was told he had committed a crime, but nature of the offense was not stated. He was placed under arrest at that time (HCR 13).

There was no psychiatric or medical examination of DeWar. He was first questioned and placed in custody about 11 o'clock the night of March 22nd (CMR 81). He was held in custody at Bad Hamburg about 100 miles from place of alleged offense (HCR 14) until after 10th

of April when he was moved to near Menden, Germany, and held there until the trial at Menden on April 22nd. Menden, Germany was from 300 to 500 miles from place of alleged rape (HCR 15).

The alleged rape was the night before between 11:00 and 11:30 March 21, 1945, at Wendelsheim, Germany (CMR 64). DeWar on that date was a Motor Messenger assigned to the Message Center Section of the Signal Company (CMR 90) which involved traveling by jeep back and forth from Division Rear to Division Forward, a distance of about 150 miles. His Company Commander, Captain Kohnstamm, saw him between 9:00 and 9:30 the night of the 21st of March. He testified that DeWar "appeared to be rather tired and he was dusty having just completed a trip from the Division Rear" and that he expressed himself "in a normal manner." And, speaking of DeWar, he said: "I have found that he has been extremely trustworthy, very reliable. In fact, he was placed on the Message Center run to Division Rear because of that. To the best of my knowledge his character has been good. I know of nothing that would lead me to believe otherwise." (CMR 90, 91)

Sergeant Kurgan testified before the Court-Martial that he was in charge of the bivouac area where he and DeWar slept the night of 21st March. Tha the saw DeWar sitting on his bunk, partially undressed, after 11:00 o'clock (CMR 95). That he had worked with DeWar continuously for sixteen months and DeWar had always proved reliable (CMR 97).

The complaining witness, Elizabeth Mathes, testified (CMR 64-70) that she and her husband were in their home in Wendelsheim, Germany, the night of March 21st, together with their eleven children, the youngest child born February 11th. That between 11:00 and 11:30 there was a knock and call at the door. She told her husband to open up, and she put on the light. "My husband and an American soldier entered." The soldier forced the husband into bed with her and then raped her. That her husband jumped out of bed and went out the door; that the soldier started after him, came back and struck her with his carbine, and went out into the street. That in the morning she found one of the soldier's leggings at the foot of the bed. That two days later she viewed DeWar and identified him as the soldier.

Her husband, Herrman Mathes, testified (CMR 70-78) that he was thirty-three years old; worked as a stoker on the railroad; former member of the German Wermacht. He testified that in the morning he reported the matter and an American doctor sent his wife to a hospital.

Military Police worked on the case immediately when Mathes made the complaint the following morning, and Lt. Bounafede of the 5th Infantry Military Police testified for the prosecution (CMR 78-90) concerning his activities and the accusation he made against DeWar.

DeWar testified in his own defense (CMR 103-110), among other things, that the Company had moved into the town of Wendelsheim that afternoon, and that when he arrived he unloaded the jeep and drove to the motor

pool and fixed some flat tires on the jeep. That he pulled off his leggings and put them in the jeep. That he had his bedroll and equipment in the jeep; that he lived "in the jeep practically all the time." That his jeep was right beside the street and there was a big sand pile there and eight or ten children playing in the sand pile; that they were around the jeep and he had to run them away. That he drank some wine during the evening and made preparations for return trip the next day; that he went to bed following the news broadcast a little after 11:00 o'clock and did not go out again that night. That during that evening he talked to several officers and soldiers and did not have leggings on. That next morning his leggings were gone and he never saw any more of the leggings until the Military Police, Lt. Bounafede, showed him the legging found in the Mathes home; that next morning he borrowed a pair of leggings but never wore them.

Petitioner brought habeas corpus in the United States District Court of Kansas. Hearing was had before District Judge Arthur J. Mellott. Petitioner contended:

(1) That Articles of War (1920) are unconstitutional when applied to an enlisted man because the statute denies him a fair trial before his equals. The Court was asked to take judicial notice of the inferior legal status of a private in the Army as fixed by statutes, Army regulations, executive orders and Army practices, usages and customs;

(2) That he was denied counsel at the preliminary or pre-trial investigation; and

(3) That the Court-Martial was without jurisdiction and there was denial of due process because there was no compliance with the mandatory requirements of Article of War 70 (10 U. S. C. 1542).

The District Court "tried to recite somewhat evidentiary" (HCR 74) the testimony and in the course of doing so made some findings favorable to petitioner (H. C. R. 68, 71, 74, 75) on Article of War 70 and the question of jurisdiction presented.

In connection with the findings made, the District Court commented that the Investigating Officer's "Testimony will be available to the Appellate Court."

The District Court also found "that at the pre-trial investigation conducted by Lt. Prendergast, petitioner was not represented by counsel." (HCR 80)

The Court of Appeals (170 F. 2d 993, 996, 997) held that a fair and impartial investigation was made. It excuses on the ground that the witnesses "were not present and not available" the refusal by the investigating officer of petitioner's request that petitioner confront and question the complaining witness and her husband.

And without comment on the undisputed fact that the investigating officer, traveling in a jeep, passed by petitioner without stopping on his trip to the complaining witness. The investigating officer testified he would have taken DeWar to the witnesses or brought the witnesses to him (HCR 41). The court found that DeWar made the request. (HCR 68)

The Court of Appeals further held that the constitutional guaranty of fair trial before one's peers or equals does not extend to military courts.

QUESTIONS PRESENTED.

1. Court-Martial was without jurisdiction because of refusal of petitioner's request that he confront and question prior to trial the complaining witness and her husband; and because there was no "thorough and impartial investigation" of the charges. All as required by Article of War 70 (10 U. S. C. 1542) and Paragraph 35a of the Manual for Courts-Martial, 1928.

2. There was a denial of due process for the reasons stated in No. 1.

3. There was denial of counsel for petitioner at pretrial investigation pursuant to Article of War 70.

4. Articles of War under which petitioner was tried are unconstitutional because they do not afford a private soldier a fair trial before his equals in contravention of 5th, 6th and 9th 9mendments.

REASONS FOR GRANTING WRIT.

Here is the case of a soldier who volunteered for the Army and for five years served his country with honor and distinction. He had a reputation for integrity and reliability. (CMR 90, 91) After months of combat duty in Europe this soldier suddenly was charged and convicted upon the doubtful testimony of the enemy, a former member of the German Wermacht, and his wife, parents of eleven children.

He was fighting to uphold our system of government by law, but when he faced Court-Martial with his life at stake, the law was ignored.

There was no compliance with Article of War 70 in this case. The requirements of this statute that there be "thorough and impartial" investigation of the truth of the charges prior to trial and that the accused shall be given full opportunity at such investigation to confront and cross-examine witnesses against him were enacted by Congress in 1920 for the specific protection of the accused soldier charged and tried for his life under circumstances and conditions not conducive to a fair trial. But this soldier was denied the protection of this statute. An inexperienced junior officer was named to conduct the investigation and he did not know his duties and responsibilities to the accused. (HCR 24, 25, 27, 36, 37, 39, 40)

(a) Conflict of opinion exists in the lower courts.

Some have held that failure to comply in substantial manner with Article 70 affects the jurisdiction of the Court, and denies due process of law:

Hicks v. Hiatt, (Pa.), 64 F. Supp. 238 (Op. by Circuit Judge Biggs).
Anthony v. Hunter, (Kans.), 71 F. Supp. 823 (Dist. Judge Mellott).
Reilly v. Pescor, (8 C. A.), 156 F. 2d 632, 634.
Smith v. Hiatt, (3 C. A.), 170 F. 2d 61 (Goodrich, C. J., dissenting).

Following decisions say that only due process is involved:

DeWar v. Hunter, (10 C. A.), 170 F. 2d 993 (Murrah, C. J., concurring).
Henry v. Hodges, (2 C. A.), 171 F. 2d 401.
Waite v. Overlade, (7 C. A.), 164 F. 2d 722, 724.

In direct conflict are the following:

Becker v. Webster, (2 C. A.), 171 F. 2d 762 (Frank, C. J., dissenting).
Arnold v. Cozart, (Tex.), 75 F. Supp. 47 (Dist. Judge Atwell).

The *Anthony* and *Arnold* decisions illustrate the conflict in the lower courts. These soldiers were members of the 4th Armored Division. They were charged with the rape of several German women at Langenlonsheim, Germany, in March, 1945. They were tried jointly at a common trial on the same evidence, same pre-trial investigation, same court and defense counsel. Judge Mellott's decision in the *Anthony* case discharged Anthony from custody and returned him to his wife and son in May, 1947. Judge Atwell's decision in the *Arnold* case in effect held that a soldier has no rights, and Arnold is imprisoned yet today.

(b) Determination of meaning and effect and constitutional validity of Federal Statutes having direct bearing upon public welfare, and upon rights of the individual citizen are involved.

Thousands of soldiers are held today in Federal Penitentiaries, Federal Correctional Institutions and Army Disciplinary Barracks as result of General Court-Martial convictions and all were entitled to the protections intended by Congress in the enactment of Article 70.

(c) Substantial compliance with Article of War 70 is jurisdictional; Court of Appeals erred by not so holding.

This statute (10 U. S. C. 1542) provides in part:

> "No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. *** ."

Courts-Martial are courts of limited and inferior jurisdiction. Strict compliance with the law is pre-requisite to their jurisdiction.

> *McClaughry v. Deming*, 186 U. S. 49, 62, 46 L. Ed. 1049.
> *Rinkle v. U. S.*, 122 U. S. 543, 545, 30 L. Ed. 1167.
> *Dynes v. Hoover*, 61 U. S. 65, 80, 15 L. Ed. 858.
> *Ver Mehren v. Sirmyer*, 36 F. 2d 876.

In *Dynes v. Hoover*, supra, the Supreme Court said:

> "Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. *In such cases, everything which may be done is void—not voidable, but void* *** ." (p. 80)

The same rule is universally applied in civil matters. In *American Agricultural Chemical Co. v. Thomas*, (S.

C.), 34 S. E. 2d 592, an action was brought to enforce a judgment without first obtaining leave of the court as required by statute. The Court said:

> " *** This contention, it seems to us, completely overlooks the specific statutory requirement which provides that 'no action shall be brought upon a judgment *** between the same parties, without leave of the Court, or a Judge thereof, at chambers, for good cause shown on notice to the adverse party.'
>
> "The statute clearly contemplates by these words of negation and prohibition, that a hearing would first have to be held upon notice to the adverse party, and that good cause would have to be shown, before an order could issue granting leave to commence the action. The manifest object of the Legislature was to prohibit an action upon a judgment until these steps had been taken. In the absence of the statutory prerequisites, the Court lacked jurisdiction to pass upon the merits of the case and to award judgment." (p. 594)

See, also, *Macaulay v. Waterman Steamship Corp.*, 327 U. S. 540, 90 L. Ed. 839; *Myers v. Bethlehem*, 303 U. S. 41, 82 L. Ed. 638.

(d) Due process of law is denied unless there is substantial compliance with Article of War 70 and Paragraph 35a of the Manual.

Attention is invited to the case of *Escoe v. Zerbst*, 295 U. S. 490, 492, 79 L. Ed. 1566, 1568, where a probation was revoked without a hearing. The Supreme Court, commenting upon the statute which requires that the defendant be brought before the court, said:

> "The privilege is no less real because its source is in the statute rather than in the Fifth Amendment *** ."

"We find in this statute more than directory words of caution, leaving power unaffected. This is so if we consider the words alone, putting aside for the moment the ends and aims to be achieved. The defendant 'shall' be dealt with in a stated way; it is the language of command, a test significant, though not controlling. *Richbourgh Motor Co. v. United States,* 281 U. S. 528, 534, 74 L. Ed. 1016, 1021, 50 S. Ct. 385, 73 A. L. R. 1081. Doubt, however, is dispelled when we pass from the words alone to a view of ends and aims *** ."

" *** Statutes are not directory when to put them in that category would result in serious impairment of the public or the private interests that they were intended to protect *** ." (p. 492)

See also *P. DeRonde & Co. v. U. S. Sugar Equalization Board,* (1924 D. C. Del.), 299 Fed. 659, wherein the court states:

"Moreover it has been held with great uniformity that what a public officer is empowered by the Congress to do for others, and it is beneficial to them to have done, the law holds that he ought to do and that in such instance the language used by the legislator though permissive in form is, in fact, mandatory." (p. 663)

If Article 70 means what it says, actual prejudice from failure to comply need not be shown. Courts will not speculate whether accused suffered injury. In *Glasser v. U. S.,* 315 U. S. 60, 76, 86 L. Ed. 680, 702, the court, speaking of the right of counsel, said, the right is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

(e) Acts of the Investigating Officer in this case did not approach substantial compliance; Court of Appeals erred in holding there was compliance.

This point has been discussed to some extent in our summary statement, supra.

This Investigating Officer, Prendergast, was appointed 4th of April. On about the 6th or 7th of April he went to see Mrs. Mathes and took the statement from her. On this trip he passed by DeWar in the stockade without stopping for him. On his way back to Headquarters he stopped at Bad Hamburg and saw DeWar (HCR 24). He read DeWar from Article of War 70 and Article 24 on self-incrimination and asked him if he wanted to make a statement. He showed him the papers for the case, showed him the statement made by Mrs. Mathes and asked him if there was anybody he could see. DeWar mentioned the boys at the Message Center (HCR 25). Prendergast testified, "I said, I will see what I can do," and "that was my time with him." (HCR 25) DeWar asked him to get an interpreter and take him back "and talk to these people that were accusing me of this crime" and Prendergast said, "it was impossible at that time." (HCR 14) The investigating officer did not see the husband of Mrs. Mathes nor did he question her children (HCR 27).

He did not ask DeWar if he wanted to cross-examine the witnesses against him and did not afford him that right (HCR 36, 54, 55). All he did was "Take the two statements and add my investigation report sheet." (HCR 37) He did not examine any witnesses in the

presence of the accused (HCR 40, 54, 55). He had never investigated a General Court-Martial case before but had investigated cases involving damages to property. He testified that he was familiar with paragraph 35 (a) of the Manual for Courts-Martial which supplements Article 70 and applies only to criminal charges; and that he made use of paragraph 35 (a) when investigating these damage claims (HCR 41, 42). Questioned by counsel for Respondent:

> "Q. Did you talk to him—did you have any discussion about Article of War 70?
> A. No, sir.
>
> Q. You simply just read the book and closed it, is that the idea?
> A. Read the book and asked him if he was going to make a statement, and he said he didn't want to make a statement. I asked him if there was any way I could possibly help him to tell me who I could see, or give me information that I could help him in his case, and the only information I could get was to see the boys in his section, and I said, 'Is that all,' and that was all."

Findings of the District Court begin at page 65 of the habeas corpus record. Findings by the Court should be considered in connection with the testimony of the witnesses. The District Court stated:

> "So I have simply tried to recite somewhat evidentiary what Lt. Prendergast testified to, and then I have concluded that other than this—other than what has been recited as to what Lt. Prendergast did do; that he had not complied with these sections, or sentences in the section, that I have read." (HCR 74)

And the District Court commented further that the "testimony will be available to the appellate court." (HCR 78)

The District Court found:

> "The Court finds in this case that there was no such full opportunity given to the accused to cross-examine witnesses against him at the investigation held before Lt. Prendergast who testified in this case as a witness.
>
> "The Court also finds as a fact that the petitioner expressed a desire while in the stockade to be permitted to cross-examine the complaining witnesses, Mrs. Mathes and her husband. The trial occurred some two or three hundred miles, perhaps more, from the place where the alleged offense occurred. At the pre-trial investigation before Lt. Prendergast which took place approximately 100 miles from where the offense is alleged to have occurred, the chief complaining witnesses, Mrs. Mathes and her husband were not present and were not available." (HCR 68, 69)

Whether these witnesses were available, must be considered in connection with the fact *that they were available to the Investigating Officer.* He was appointed on the 4th of April and made his report on the 10th of April (CMR 31). He testified:

> "Q. Would you say whether or not you were under any particular pressure at that time?
>
> A. No, sir. We intended to move but that was the only thing I had to do until I had it finished." (HCR 38)

He drove through the town where DeWar was held on his way to see the complaining witness. He did not attempt to see DeWar until his return trip. (HCR 24)

He testified he did not remember whether DeWar asked to be taken to the complaining witness and her husband, and that—

> "Q. Had he done so, what would you have done?
> A. I would have taken him back there, or brought the witness up to him, whichever was available." (HCR 41)

In view of the foregoing, the finding of the District Court that the woman and her husband "were not present and were not available" was merely a recital that they were not present when the Investigatting Officer stopped to see DeWar.

The District Court further found:

There was no opportunity given the accused to confront and cross-examine the witnesses against him; that the Investigating Officer did exhibit to DeWar certain statements; that the Investigating Officer had very little, if any, experience as such; that the Investigating Officer did not permit DeWar to present anything he might desire in his own behalf (HCR 68, 69, 71); that the Investigating Officer made his report on a typewritten or mimeographed form furnished him for that purpose. (This form was prepared to recite compliance with Article of War 70, CMR 31); that he did not advise DeWar of his right to cross-examine the witnesses against him or of his right to present matter in his own behalf, other than by reading from the Manual, and that the Investigating Officer's report, as contained in the Court-Martial record at page 31, wherein it recites to the contrary, is false (HCR 75).

Bearing on whether any offense had in fact been committed, the only thing done by the Investigatitng Officer was take the ex parte statement of the complaining witness. He took one other statement, that of Sergeant Kurgan. These statements are shown at pages 46, 47 and 48 of the Court-Martial record. Prior to execution of charges and appointment of an Investigatting Officer, Lt. Buonafede of the Military Police took statements from the complaining witness and her husband (CMR 34-35 and 39-40). The husband stated (CMR 39) that he went "into the neighborhood to find help *** but nobody came along with me because everybody was afraid to be seen in the street." Neither Lt. Buonafede nor the Investigating Officer questioned these neighbors, nor any of the eleven children of the complaining witness (HCR 24, 25, 27, 36, 37, 39, 40). In the evening of 21 March 1945, petitioner patched tires on his jeep. Eight or ten children were playing around the jeep. Petitioner put his leggings in the jeep and next morning they were gone (CMR 104). Assume they were carried away by third parties and the husband, Mathes, former German soldier, found a legging in his home, beat and assaulted his wife so that she required American medical attention. Questioning of the children and neighbors might have developed the fact no crime had been committed by any American soldier. Medical and psychiatric examination of petitioner would have been appropriate in view of the nature of the charges. But he received no such consideration.

Soldiers were paraded before the complaining witness and her husband by the Military Police, Lt. Buonafede, and two other soldiers had been identified by them. The Prosecution stated to the Court, (CMR 101) speaking of these two men, "They have been identified at one time or another as the accused by the accusing witness." No mention of this is made in the record of pre-trial proceedings and it is clear beyond dispute from the testimony of the investigatting officer, Prendergast, as referred to above, that he never heard of these soldiers and he did not question them.

The complaining witness and her husband did not attempt in any of the statements made by them, those on March 22 or 23 (CMR 34-35 and 39-40), nor the one to the Investigating Officer on April 6 or 7 (CMR 47-48), to describe their assailant. DeWar had a deep perpendicular scar on his face. A thorough investigation would have elicited from her and her husband at the earliest time, a description of the alleged attacker. This omission is significant and sufficient in itself to compel a holding this was not a thorough and impartial investigation of the charges. (And see testimony of complaining witness, CMR 69.)

(f) Congress intended Article 70 as jurisdictional. Administrative or judicial interpretation by Judge Advocate General Department for twenty-three years evidences intent of Congress.

Following the World War there was widespread criticism of Army Courts-Martial. A score of bills were put before Congress. Hundreds of pages of congressional debate, hearings and reports were had. (See explanation by Senator Chamberlain, Congressional Record, Vol. 59, Part 6, pages 5843, 5844.)

A committee of the American Bar Association was appointed. Its report was not published, but was discussed. (See Proc. Am. Bar, Vol. 44, pages 84, 70, 44.)

See also, "Hearings before Subcommittee of Senate Committee on Military Affairs, 66th Congress, First Session on Senate Bill 64, A bill to establish military justice." See, also, House Report 940 (66th Congress, 2nd Session) on one of the earlier bills (HR 13942).

Two Army committees had been appointed to recommend changes in the Articles of War. (See Senator Chamberlain's remarks mentioned supra.)

The Acting Judge Advocate General in charge of Military Justice, S. T. Ansell, had drafted one of the bills and he testified to an extent of 300 pages before the Senate Subcommittee mentioned above.

The Judge Advocate General's Department knew well enough what Article 70 meant. And beginning in 1924 that department of the Army held:

> "A record of trial showed affirmatively that no investigation of the charges had been made prior to the trial. Held, The provisions of A. W. 70 with

reference to investigating charges are mandatory and there must be a substantial compliance therewith before charges can legally be referred for trial. A court-martial is without jurisdiction to try an accused upon charges referred to it for trial without having been first investigated in substantial compliance with the provisions of A. W. 70 and, in such a case, the court-martial proceedings are void ab initio. C. M. 161-728 (1924)"

J. A. G., Dig. Op. 1912-1940.

In 1937, Article 70 was amended to eliminate this jurisdictional requirement as to summary and special courts-martial, which are concerned for the most part with minor offenses.

As late as 1944 the Army looked upon Article 70 as jurisdictional. (See Bulletins J. A. G., March, 1944, Vol. 3, Sec. 377, page 95.)

But the Army now refers to the *Floyd* case (CM 209477) decided by one of the Branch Office review boards in the European Theatre in 1943.

(g) Petitioner was denied counsel at the preliminary or pre-trial investigation.

DeWar had not been assigned counsel at the time he was visited by the Investigating Officer, sometime between April 6 and April 10. The order creating the Court-Martial and designating counsel was dated April 13, 1945 (CMR 58). Report of the investigation was made April 10, 1945 (CMR 31). The Articles of War did not provide for counsel at the preliminary investigation. There are cases indicating the right to counsel extends to the preliminary hearing. *Wood v. U. S.*,

128 F. 2d 265, 271. It was not for him to know and to inform the investigating officer what to do. *Williams v. Kaiser*, 323 U. S. 471, 89 L. Ed. 398; *Snyder v. Massachusetts*, 291 U. S. 97, 78 L. Ed. 674; *Carter v. Illinois*, 329 U. S. 173, 181, 91 L. Ed. 172, 178.

(h) Articles of War under which petitioner was tried were unconstitutional when applied to a private soldier because of the requirement the court be composed entirely of officers, thus denying a fair trial before peers or equals in violation of the 5th, 6th and 9th Amendments.

The power of Congress to provide for the regulation of the Army and Navy is limited or controlled by the due process clause of the Constitution, and by the guarantee of fair trial contained in the Sixth Amendment. The two decisions by the Supreme Court, in the cases of *In re Yamashita*, (1945), 327 U. S. 1, 90 L. Ed. 499, and *Ex Parte Quirin*, (1924), 317 U. S. 1, 87 L. Ed. 3, indicate this clearly enough.

It follows, we feel, that by the same token an American soldier subjected to trial by court-martial is entitled to a trial before his peers or equals. The abrupt distinction in class and status which exists between an Army officer and an enlisted man as a result of Army custom, practice and usage, and as a result of Statutes and Army Regulations, is such that this court will take judicial notice of it and of the fact that the distinction is of such magnitude that an enlisted man put on trial for his life before a court composed entirely of officers is thereby deprived of a right to a trial before his equals. The Ninth Amendment, which retains in the people all of the

age-old rights and safeguards to liberty not enumerated in the Constituttion, continues for the protection of the enlisted soldier the right to a trial before his peers.

The Articles of War themselves contain a specific protection for the benefit of an officer tried before a general court-martial, in contrast to the lack of protection accorded the enlisted man. Article of War 16 (10 U. S. C. 1487) which provides how an officer is triable, reads:

> "Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank."

Touching upon the subject of trial before one's peers, the Supreme Court, in *Strauder v. West Virginia*, 100 U. S. 303, 308, 309, 25 L. Ed. 664, 666, said:

> "The very idea of a jury as a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says: 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called 'packing juries.' It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. ***
>
> "The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as

> possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property."

See, *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84.

Equal protection of the laws, under the 14th Amendment, as mentioned in the above quotation, is, as to this petitioner DeWar, more than fully comprehended by the due process clause of the Fifth Amendment.

We have not been able to analyze the statutes, regulations and practices having the effect of law and thus demonstrate the inferior legal status of the enlisted man in the Army and include the same in this petition. We will do so by brief in the event the writ is granted. As tending to support petitioner's contention on this point, we respectfully ask leave to quote very briefly from the testimony of Samuel T. Ansell, Brigadier General and Acting Judge Advocate General of the Army for a time during the World War, given at "Hearings before a Sub-Committee of the Committee on Military Affairs, United States Senate, 66th Congress, 1st Session, on Senate Bill 64, a Bill to Establish Military Justice." General Ansell's qualifications are stated at page 52. He was a West Point graduate. Instructor in law at West Point. He had line service of five years, including two years of active duty in the Philippines. He had been on duty in the Judge Advocate General's office since 1912. His extended statement before the subcommittee included the following:

"The truth of the matter is that we do not regard the enlisted men of the Army as really human beings, persons, who can suffer, and who when properly appealed to can respond, can actually move mountains through that appeal, but rather as property." (p. 154)

and, further:

"Senator Lenroot. Was there ever a difference in the treatment of the records of trials of men and officers?

Mr. Ansell. A world-wide difference, Senator. You let an officer be tried, and there is a straining of energy from the time the original investigation begins. You let a charge be made against an officer, and the whole system lines up really to see that there is an absolute necessity of trial or there will be none.

* * * * *

I say here, with the keenest sense of my responsibility in making the statement, that an officer and an enlisted man in our establishment do not at all get the same kind of justice. I say that they stand at opposite poles. Every presumption is made in favor of the officer. There is a thoroughness of trial that we do not find elsewhere. Our treatment of the enlisted men is to run them through the mill." (pp. 196, 197)

See also pages 103-109, 134, 149, 209-215, 260-263, 277-283, of the report of this hearing.

CONCLUSION.

We respectfully say that this case presents very serious and important questions of constitutional and statutory law. Supreme Court ruling on the jurisdictional aspects of Article of War 70 has become necessary by the conflicts of opinion expressed by the lower courts. There is very serious question of the constitutionality of the Articles of War under which petitioner was tried and imprisoned.

Respectfully submitted,

HOWARD F. McCUE and
ROY N. McCUE,
505 Columbian Building,
Topeka, Kansas,
Attorneys for Petitioner.

FILE COPY

No. 648

Office - Supreme Court, U. S.
FILED
MAY 13 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

EARNEST DEWAR, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

HOWARD F. McCUE and
ROY N. McCUE,
505 Columbian Building,
Topeka, Kansas,
Attorneys for the Petitioner.

KELLEY PRINTING CO., TOPEKA

IN THE

SUPREME COURT OF THE UNITED STATES

1948 TERM

No. 648

EARNEST DEWAR, PETITIONER,

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

Respondent has filed brief in opposition to certiorari. We thank the Honorable Court for granting petitioner leave to reply.

DUE PROCESS.

Here is the case of a soldier who enlisted and served for five years with honor to his country and to himself. Suddenly, he was accused of an attack upon a German civilian. This accusation was made at a point 100 miles from the scene of the alleged attack, and he was carried

along with the Army at least 200 miles farther away from the scene for his trial. Following another war and widespread criticism of Army Courts-Martial, and after hearings conducted by two committees appointed by the Army and War Department, and a committee appointed by the American Bar Association, and after extended Congressional hearings and consideration, Congress enacted for the first time, Article of War 70. It was designed for the protection of DeWar, and others charged with a General Court-Martial offense. At the 1920 hearings before Congress the Judge Advocate General Crowder and Acting Judge Advocate General S. T. Ansell, testified. Ansell had been in charge of Military Justice during the war, and had championed the rights of the enlisted soldier. Ansell drafted the bill which included Article 70. With all this knowledge and history within the Judge Advocate General's Department, that department, when the question first arose, held that substantial compliance with Article 70 was jurisdictional. This interpretation was followed for 20 years.

The District Court found that DeWar requested the right to confront and question the Germans and his request was refused. And there was no semblance of thorough and impartial investigation.

If this Honorable Court now accepts respondent's contention, and denies to this American combat soldier, convicted upon the testimony of the German disciples of Hitler, the protection of the statute, enacted for his specific benefit, it will amount to the nullification of the great decisions of the Court which have done so much

to preserve the confidence of the common citizen in his government as one where freedom and individual rights are determined and protected by law and not by men.

Failure to follow Article 70 constitutes a denial of due process, and the Court said in the Glasser case, 315 U. S. 60, 76, that it will not speculate on the degree of prejudice, but will enforce the right.

CONSTITUTIONALITY OF ARTICLES.

The Court should review this case and declare the Articles of War unconstitutional. This could result in the enactment of Articles of War which would divorce Courts-Martial and the Judge Advocate General's Department from Army Command and assure a fair trial of a soldier brought before a Court-Martial. DeWar's Court, as required by law, was made up of officers named by the Commanding General of the 5th Infantry Division. This same appointing authority named the prosecuting attorneys, the defense counsel, passed upon the sufficiency of the evidence to require trial, referred the charges to the Court for trial, and reviewed the record after trial. He was the symbol of discipline and authority in the division. This same Commanding General controlled the members of the Court in their assessments, their efficiency ratings and promotions. The Articles of War result in indirect influence upon every Court-Martial in violation of the rule established by the decisions in *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749; and *Craig v. Harney*, 331 U. S. 367, 91 L. Ed. 1546.

By reason of the foregoing considerations, DeWar, who had been denied the protections of the statute, was convicted before evidence had been introduced at his trial. This is evidenced by the record of trial by Court-Martial, pages 5 and 52 (CMR 63 and 110) where the President of the Court-Martial in effect gave testimony concerning the provisions of an order forbidding fraternization with German civilians. This testimony by a member of the Court was forbidden by Article of War 8 (10 U. S. C. 1479) which provides that—

> "No officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution."

In conclusion, we respectfully submit petitioner's case with confidence that the law will be applied and that he will receive justice at the hands of this Honorable Court.

Respectfully submitted,

HOWARD F. McCUE and
ROY N. McCUE,
505 Columbian Building,
Topeka, Kansas,
Attorneys for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Humphrey v. *Smith*, decided April 25, 1949	4
Ex parte Quirin, 317 U. S. 1	5

Statutes:

Act of June 24, 1948, c. 625, 62 Stat. 628	5
Sec. 203	5
Sec. 244	5
American Articles of War of 1775, Art. XXXIII	5
American Articles of War of 1776, Sec. XIV, Art. 1	5
American Articles of War of 1786, Art. 1	5
American Articles of War of 1806, Art. 64	5
American Articles of War of 1874, Art. 75	5
Articles of War of 1920:	
AW 4 (10 U.S.C. 1475)	4, 5
AW 48 (10 U.S.C. 1519)	3
AW 70 (10 U.S.C. 1542)	4
AW 92 (10 U.S.C. 1564)	3
AW 93 (10 U.S.C. 1565)	3
AW 96 (10 U.S.C. 1568)	3
British Articles of War of 1765, Sec. XV, Art. I	5

Miscellaneous:

Winthrop, *Military Law and Precedents* (1920 Reprint)	5

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 648

ERNEST DEWAR, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority (R. 21-28) [1] and concurring (R. 28-29) opinions in the Court of Appeals are re-

[1] The typewritten record in this Court is in three parts, which are not paginated consecutively. The first 37 pages, containing the pleadings in the District Court and the proceedings in the Court of Appeals, are referred to herein by the designation "R." Immediately following, in 91 pages, is the "Transcript of Proceedings" in the District Court. These pages will be referred to by the designation "Tr." Finally, there is the photostatic copy of petitioner's court-martial record, in 117 pages, which was received in evidence at the

ported at 170 F. 2d 993. An informal, oral opinion of the District Court, not reported, appears at Tr. 82-89.

JURISDICTION

The judgment of the Court of Appeals was entered November 3, 1948 (R. 30), and a petition for rehearing (R. 31-35) was denied December 6, 1948 (R. 36). By order of Mr. Justice Rutledge, dated February 23, 1949, the time for filing a petition for a writ of certiorari was extended to March 19, 1949. The petition was filed March 17, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the general court-martial which tried petitioner was without jurisdiction because of alleged defects in the pre-trial investigation of the charges.

2. Whether Article of War 4, designating the persons competent to serve on courts-martial, was unconstitutional by reason of its failure to make enlisted men eligible to sit on courts-martial which tried enlisted men.

STATEMENT

On April 22, 1945, petitioner, a private in the United States Army, was convicted in Germany by an Army general court-martial of rape and other

---

hearing in the District Court. "CM R." will be used to refer to the court-martial record, the references being to the pencilled numbering at the lower right-hand corner of each page.

offenses, in violation of the 92d, 93d, and 96th Articles of War, and was sentenced to death by hanging (CM R. 1, 27-29, 111). Following review of the record by the Staff Judge Advocate of the 5th Infantry Division (CM R. 17-20), the Commanding General of the Division approved the sentence and forwarded the record of trial for action under Article of War 48 (CM R. 113). The record of trial was thereafter again reviewed by the Staff Judge Advocate, Headquarters, European Theater of Operations, United States Army (CM R. 21-24), following which the Commanding General of the European Theater of Operations, General Eisenhower, confirmed the sentence, but commuted it to life imprisonment, total forfeitures, and dishonorable discharge (CM R. 114). Thereafter, the record of trial was again reviewed by Board of Review No. 1, Branch Office of the Judge Advocate General, European Theater of Operations, which found it legally sufficient to support the findings and sentence (CM R. 4-11). This holding was approved by the Assistant Judge Advocate General, European Theater of Operations (CM R. 3). The sentence was thereupon duly promulgated (CM R. 1-2). Subsequently, by order of the Secretary of War, at the direction of the President, so much of the imprisonment portion of the sentence as was in excess of 30 years was remitted (R. 11).

On or about December 5, 1947, petitioner filed in the District Court for the District of Kansas a petition for a writ of habeas corpus (R. 1-3), which

challenged the jurisdiction of the general court-martial on the ground that, allegedly, the pre-trial investigation of the charges had not been thoroughly and impartially conducted, as required by Article of War 70 (10 U. S. C. 1542). The petition also challenged the constitutionality of Article of War 4 (10 U. S. C. 1475), limiting the persons qualified to serve on courts-martial to commissioned officers, on the ground that, as applied to the court-martial trial of petitioner, a private, it operated to deprive him of a "trial before his peers" (R. 2). A writ issued and a return was filed (R. 5-9). Following a hearing (Tr. 1-91), the writ was discharged (R. 12), and on appeal the order was affirmed (R. 30).

ARGUMENT

1. Petitioner's contention (Pet. 8-22) that the court-martial was without jurisdiction because of alleged defects in the manner in which the pre-trial investigation of the charges was conducted is now foreclosed by this Court's decision in *Humphrey* v. *Smith,* No. 457, decided April 25, 1949, holding that compliance with Article of War 70 is not a jurisdictional prerequisite to trial by general court-martial.

2. Petitioner's only other contention (Pet. 22-25)—that the "Articles of War under which petitioner was tried were unconstitutional when applied to a private soldier because of the requirement the court be composed entirely of officers, thus

denying a fair trial before peers or equals in violation of the 5th, 6th and 9th Amendments" (Pet. 22)—is also without merit. Nothing in any of the constitutional provisions cited supports petitioner's contention. See *Ex Parte Quirin*, 317 U. S. 1, 40. Until the 1948 revision of the Articles of War (Act of June 24, 1948, c. 625, Title II, § 203, 62 Stat. 628),[2] which became effective February 1, 1949 (*id.*, § 244), military personnel other than commissioned officers were never eligible to sit on courts-martial.[3] This limitation obtained before as well as since the adoption of the Constitution.[4] Under petitioner's theory, no enlisted man, at least prior to February 1, 1949, has ever been validly convicted by court-martial. The absurdity of such a con-

---

[2] As amended by § 203 of the 1948 Act, Article of War 4 provides, in pertinent part, that "Enlisted persons * * * shall be competent to serve on general and special courts martial for the trial of enlisted persons when requested in writing by the accused * * *. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court."

[3] "The detailing of non-commissioned officers or soldiers, where the accused is one of these grades, with commissioned officers, on courts-martial, which is required by some of the European codes, has never been authorized by our law." Winthrop, *Military Law and Precedents* (1920 Reprint), p. 70.

[4] See British Articles of War of 1765, in force at the beginning of the Revolutionary War, Sec. XV, Art. I (Winthrop, *Military Law and Precedents* (1920 Reprint), p. 942); American Articles of War of 1775, Art. XXXIII (*id.*, p. 956); American Articles of War of 1776, Sec. XIV, Art. 1 (*id.*, p. 967); American Articles of War of 1786, Art. 1 (*id.*, p. 972); American Articles of War of 1806, Art. 64 (*id.*, pp. 981-982); American Articles of War of 1874, Art. 75 (*id.*, p. 992).

clusion is itself a sufficient answer, we think, to his contention.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court and should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

APRIL 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 635033